UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-SAJ **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE JOYNER'S MAY 20, 2008 OPINION AND ORDER COMPELLING WITHHELD DATA AND SANCTIONING PLAINTIFFS**

Defendants submit this joint Response opposing Plaintiffs' Objections to Magistrate Judge Joyner's Order of May 20, 2008 at Docket No. 1710. The Magistrate Judge's findings were not clearly erroneous, and the Court should deny the unfounded Objections and uphold the well-reasoned and measured Order sanctioning Plaintiffs.

I. BACKGROUND

Defendants first moved to compel Plaintiffs' scientific data in May 2006. (Dkt. No. 743.) After eight months of motion practice on the issue, the Court ruled on January 5, 2007 that Plaintiffs' "denial of the information to Defendants would deny vital information necessary to Defendants' defense." (Dkt. No. 1016 at 8.) Recognizing the critical nature of the missing data, the Court ordered Plaintiffs to produce the information by February 1, 2007. The January 5, 2007 Order did not create any exceptions or carve-outs; it addresses all of Plaintiffs' scientific data and information.

The following year (February 2007 to February 2008) was marked by continued exchanges and meet-and-confer sessions in which Plaintiffs agreed to produce information and then either delayed production for long periods or never produced the information at all. (See Dkt. No. 1605 at 4-7.) After finding new evidence that Plaintiffs had failed to comply with the

January 2007 Order (see id. at 7-9, Dkt. No. 1565-15), and concluding that only the Court could force Plaintiffs to comply, Defendants filed their "Motion to Compel Plaintiffs' Compliance with the Court's Order on Data Production" in February 2008.

Plaintiffs responded to Defendants' motion by averring that they had already produced "all" outstanding data. (Dkt. No. 1656 at 1-2.) Then in contradiction of that representation, on March 25, April 4, April 29, and May 2, 2008, Plaintiffs produced data that had been identified by Defendants, but not previously produced. In each cover letter accompanying the new productions, Plaintiffs acknowledged that they were providing the information "[p]ursuant to the Court's order of January 5, 2007." (Dkt. No. 1656-2 at 1 and Apr. 3, Apr. 29, & May 2, 2008 Ltrs. from L. Bullock to M. Bond: Ex. 1.) Plaintiffs repeatedly asserted that these productions mooted Defendants' motion. (E.g., Dkt. No. 1656 at 2; Dkt. No. 1691 at 5.) Plaintiffs also erroneously represented to the Court that the majority of the post-motion data was duplicative of prior productions. (Dkt. No. 1691 at 7; Dkt. No. 1707: May 6, 2008 Hrg. Tr. at 107-08.)

Plaintiffs had been holding some of those materials for years. To highlight just a few examples, it was spring of 2008 before Plaintiffs produced field notebooks and synoptic river field sheets dated as early as 2006 – notebooks and field sheets that contain highly valuable field information and observations. (See Dkt. No. 1572-2 ¶ 3.) The March 25, 2008 production also revealed that Plaintiffs had withheld until February 2008 notes of Dr. Bert Fisher from April and May 2007, notes that Plaintiffs admit are subject to the January 2007 data Order. The Dr. Fisher production had occurred only due to the Court's Order that preliminary injunction ("PI") experts' considered materials be produced. (See Dkt. No. 1656-2 at 2.)

Plaintiffs also improperly withheld bacteria data collected, analyzed, and sent directly to PI expert Dr. Roger Olsen well before the PI hearing, and offered no explanation or justification

for the delay when they finally produced this data. For instance, only in response to Defendants' present data motion did Plaintiffs finally produce at least 20 bacteria samples taken in early December 2007 and analyzed and returned to Dr. Olsen on December 21 or 26, 2007. (See Dkt. No. 1572-2 ¶ 3, Dkt. No. 1572-3.) Both the Court's Order compelling disclosure of considered materials for PI experts and the January 2007 Order independently required Plaintiffs to produce this bacteria information to Defendants, yet they failed to do so until faced with the present motion. As the Court is aware, the intervening hearing on the PI motion focused solely on the issue of bacteria.

Plaintiffs were granted the fullest hearing possible on Defendants' motion. Magistrate Judge Joyner allowed Plaintiffs an extension of time to file their response, allowed a surreply, and heard lengthy oral argument. Magistrate Judge Joyner's May 20 Order cited multiple bases for awarding sanctions under these circumstances, including Rules 37(a)(5)(A), 37(b)(2)(A)(i) through (vii), and 37(b)(2)(C), and explained the range of available sanctions much harsher than a fee award. (Dkt. No. 1710 at 5.) Before imposing sanctions, the Court reiterated (1) "that Defendants did make proper demand and that meet and confer discussions were conducted" and (2) "that Plaintiff's obligations of supplementation exist pursuant to Rule 26 and compliance with those obligations is required regardless of any demand or meet and confer obligations." (Id. at 6.)

Based on the history of delays and Plaintiffs' belated post-motion productions, Magistrate Judge Joyner held that Plaintiffs had failed to comply with the January 2007 Order and the Federal Rules. In particular, Magistrate Judge Joyner ruled that "production of the data was improperly delayed" and that "most of the [post-motion] production was new and not a duplication of prior hard copy materials contrary to Plaintiffs' representation." (Id. at 3, 4).

Rather than imposing a specific sanction at that time, Magistrate Judge Joyner requested further submissions concerning the appropriate amount of sanctions, including itemized statements of costs from Defendants. Plaintiffs have 15 days to file objections to the claimed fee charges. (Dkt. No. 1710 at 6.) Defendants submit that this is an extremely fair manner in which to sanction an obstructionist party.

II. ARGUMENT

In ruling on an objection, a district court is "required to defer to the magistrate judge's ruling unless it was clearly erroneous or contrary to law." Allen v. Sybase, Inc., 468 F.3d 642, 658 (10th Cir. 2006) (quoting in part Hutchinson v. Pfeil, 105 F.3d 562, 566 (10th Cir. 1997)). In applying the clearly erroneous standard, "the reviewing court must affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. (quoting in part Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1464 (10th Cir. 1988)).

Plaintiffs insist that the May 20, 2008 Order was "clearly erroneous" in finding that "meet and confer discussions were conducted" (Dkt. No. 1716 at 8) and in Magistrate Judge Joyner's exercise of discretion in concluding that imposition of some attorneys' fees was warranted (id. at 1-15). Magistrate Judge Joyner neither abused his discretion nor issued clearly erroneous findings in determining that Plaintiffs deserved sanctions.

A. The Court's Meet and Confer Finding Is Amply Supported by Record Evidence and Not Dispositive of the Motion.

Plaintiffs' primary objection asserts that the Court was clearly erroneous in finding that the parties had met and conferred. This objection fails for two reasons. First, the Rules impose no meet-and-confer requirement under the circumstances here. Second, even in the absence of a requirement, Defendants did in fact meet and confer repeatedly with Plaintiffs concerning the discovery responses at issue here.

Defendants were under no obligation to meet and confer with Plaintiffs regarding their continued violation of the January 5, 2007 Order – once an Order is in place, the Rules permit aggrieved parties to bring noncompliance to the Court's attention. Compare Fed. R. Civ. P. 37(a) with 37(b). Likewise, as the Court found, the Rules impose no duty on a party to meet and confer regarding another party's obligation to supplement discovery responses. (See Dkt. No. 1710 at 6.)

Despite the absence of a meet-and-confer requirement concerning Plaintiffs' violation of the January 5, 2007 data Order, Defendants in fact did so for a year in sincere efforts to avoid further Court intervention. The underlying motion was accompanied by several letters and emails evidencing a year's worth of attempts at conferring with Plaintiffs about their failure to abide by the Court's January 5, 2007 Order. (Dkt. No. 1605 at 4-7, supported by Dkt. Nos. 1395-5, 1605-2; 1605-3; 1605-4; 1605-5; 1605-6; 1605-8; 1605-9; 1605-10.) Even Plaintiffs admit that "Defendants have raised alleged concerns about the [data] production over a period of months." (Dkt. No. 1716 at 4.)

Given the abundant evidence of actual meet and confers (and the reality that such conferences were not required in this context), Magistrate Judge Joyner's holding "that meet and confer discussions were conducted" is not clearly erroneous. The Court should reject Plaintiffs' Objection on this ground.

B. The Court Is Well Within Its Discretion to Sanction Plaintiffs.

Plaintiffs do not specifically challenge the Court's findings that "production of the data was improperly delayed" or that "most of the [post-motion] production was new and not a duplication of prior hard copy materials contrary to Plaintiffs' representation." (Dkt. No. 1710 at 3, 4). Instead, Plaintiffs claim clear error by arguing that:

- Magistrate Judge Joyner's Order cited Rule 37(a)(5)(A) without citing to any romanette sub-provision of that particular Rule and without citing to the parallel Local Rule (see Dkt. No. 1716 at 2, 11-13);

- the Order should not have imposed sanctions for violations demonstrated by Plaintiffs' post-motion production because the allegations were not (and could not have been) made in the underlying motion (see id. at 6, 14-15);

- the Order did not sufficiently consider Plaintiffs' supporting affidavit (see id. at 12-13); and

- the Order should have more clearly held that Plaintiffs violated the January 5, 2007 Order (see id. at 14).

None of these slim arguments provides grounds for overturning the May 20, 2008 Order.

In this Circuit, the control of discovery is strictly a matter of court discretion. Rodriguez v. IBP, Inc., 243 F.3d 1221, 1230 (10th Cir. 2001); Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987). One tool of control is Rule 37, which allows courts to impose a range of sanctions for failure to comply with discovery orders. "If a party ... fails to obey an order to provide or permit discovery ... the court ... make such orders in regard to the failure as are just." Fed. R. Civ. P. 37(b)(2). Courts also enjoy broad inherent power in fashioning discovery sanctions. "[A]ny conduct of the kind that ordinarily would be sanctionable under Rule 37 but which falls outside the express terms of the rule can be remedied by exercise of the Court's inherent powers..." Lewis v. Wal-Mart Stores, Inc., Civ. No. 02-0944 (CVE/FHM), 2006 U.S. Dist. LEXIS 47014, at *9-10 (N.D. Okla. July 11, 2006). Indeed, as Magistrate Judge Joyner noted, under Rule 37(b)(2) he could have entered much steeper sanctions for Plaintiffs' actions. (See Dkt. No. 1710 at 5.)

Rule 37 separately mandates that where, as here, "the disclosure of requested discovery is provided after the motion was filed – the court must, after giving an opportunity to be heard, require the party ... whose conduct necessitated the motion, the party, or attorney advising that

conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). The Rule requires an award of expenses unless the district court specifically finds that an exception applies. Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1555 (10th Cir. 1996). Although Plaintiffs argued that Defendants' motion was mooted by the post-motion productions, Plaintiffs cannot moot a motion to compel by producing demanded materials after the motion is filed. See Augustine v. Adams, 169 F.R.D. 664, 666 (D. Kan. 1996); McDonald v. HCA Health Servs. of Okla., Inc., 2006 U.S. Dist. LEXIS 89798, at *9-10 (W.D. Okla. Dec. 11, 2006) (awarding attorney's fees where portion of production made after motion to compel was filed).

The Supreme Court has taken a strong stand on Rule 37 sanctions, emphasizing that district courts may issue sanctions both to punish and deter. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976); see also Adolph Coors Co. v. Am. Ins. Co., 164 F.R.D. 507, 519 (D. Colo. 1993). Apart from Rule 37's direction regarding the effect of post-motion productions, Tenth Circuit courts have chastised plaintiffs for withholding information in similar situations:

> Cases such as this wherein defendants are sued for millions of dollars and are required to incur hundreds of thousands of dollars in defense costs deserve a higher degree of care than was employed by [plaintiff] and its Outside Counsel in this case. .... Counsels' duty to assure the production of documents to the adverse party is no less than the duty to prepare their client's case for trial. In the court's view, the responsibility to produce documents is underscored when a governmental agency sues a private citizen, as occurred here, while at the same time holding the primary evidence upon which the case will be tried.

Resolution Trust Corp. v. Williams, 162 F.R.D. 654, 660 (D. Kan. 1995) (emphasis added). Additionally, given Plaintiffs' erroneous representations to the Court that the majority of the post-motion data was duplicative, Magistrate Judge Joyner could in his discretion have

sanctioned Plaintiffs' attorneys by awarding fees for "multipl[ying] the proceedings ... unreasonably and vexatiously." See 28 U.S.C. § 1927.

First, despite Plaintiffs' claim otherwise, the Court's failure to cite in its Order the romanette sub-provisions under Rule 37(a)(5)(A) in no way constitutes reversible error. (See Dkt. No. 1716 at 11-13.) The Court's citation to "Rule 37(a)(5)(A)" – as opposed to "37(a)(5)(A)(i)" or "37(a)(5)(A)(ii)" or "37(a)(5)(A)(iii)" – is more than sufficient to demonstrate the basis for the Court's action.

Second, Plaintiffs' argument that the Court could not consider their multiple post-motion productions is illogical. (See Dkt. No. 1716 at 14-15.) If parties were actually barred from raising post-motion productions or from seeking sanctions for such conduct – or if Courts were barred from so issuing sanctions – Rule 37's provision on the very topic would be nonsensical. Plaintiffs' cited cases do not hold otherwise. (See id.) The cases simply found that a party could not assert on reply new demands to compel particular kinds of discovery or new claimed deficiencies not raised in the underlying motion. Peacock v. Merrill, 2008 WL 176375, at *7 (S.D. Ala. Jan. 17, 2008); Valenzuela v. Smith, 2006 WL 403842, at *2 (E.D. Cal. Feb. 16, 2006). In contrast here, Plaintiffs' new productions addressed on reply were the very deficiencies already at issue in the motion before the Court.

Plaintiffs also seek to overturn the Order by contending that the Court did not sufficiently consider the supporting Affidavit of Todd Burgesser. (Dkt. No. 1716 at 12-13.) To the contrary, the Court's decision emphasized that Plaintiffs' proffered Affidavit actually supported Defendants' arguments by admitting that a substantial amount of information subject to the data Order was improperly delayed. (See Dkt. No. 1710 at 3.)

Plaintiffs' argument that the Court did not specifically hold that they violated the January 2007 data Order fares no better. (Dkt. No. 1716 at 14.) Plaintiffs admitted when they produced the post-motion data in March, April, and May 2008 that the information was provided "[p]ursuant to the Court's order of January 5, 2007." (Dkt. No. 1656-2 and Ex. 1.) Magistrate Judge Joyner found that these productions were subject to the January 2007 Order (see Dkt. No. 1710 at 2-3), found that data productions were "improperly delayed" (id. at 3), and expressly analyzed Plaintiffs' behavior under the provision of Rule 37(b)(2)(A) "for failure to comply with a court order entered under Rule 37(a)" (id. at 5). Defendants respectfully submit that this Order holds that Plaintiffs violated the January 5, 2008 Order under any reasonable standard of specificity.

Despite voluminous discovery motion practice and several sanctions requests since the case was filed three years ago, the May 20 Order is the only instance where Magistrate Judge Joyner has imposed sanctions on any party. Plaintiffs' behavior regarding the disclosure of fundamental scientific data and information in this case has been egregious and is deserving of sanction. Because the sanctions award is neither clearly erroneous nor contrary to law, this Court should reject Plaintiffs' Objection.

III. CONCLUSION

The May 20, 2008 decision was necessary to correct the tone of discovery in this matter. Defendants urge this Court to reject Plaintiffs' Objections and to affirm Plaintiffs' obligation to abide by the Court's discovery Orders and the Federal Rules of Civil Procedure by upholding the May 20, 2008 Order.

Respectfully submitted,

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